

# United States Senate

November 13, 2019

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1301 Constitution Ave. NW  
Washington, DC 20460

Dear Administrator Wheeler,

I write to you with serious concerns, and a number of questions, regarding EPA's activities in relation to the North Birmingham Alabama 35<sup>th</sup> Avenue Superfund site ("**35<sup>th</sup> Avenue Site**"). I share many of the concerns that Birmingham Mayor Randall Woodfin expressed in his letter of June 18, 2019, to EPA Deputy Assistant Administrator Stephen Cook.

On August 13, 2018, I sent a letter urging you to review and reconsider EPA's previous decision not to list the 35<sup>th</sup> Avenue Site on the National Priorities List ("**NPL**"). On October 5, 2018, I received a reply from Deputy Regional Administrator Mary S. Walker, which provided helpful clarification on several issues. Since receipt of your letter, a number of further developments have taken place. In November 2018, an EPA official – EPA Region IV Administrator Trey Glenn – was indicted on state ethics charges for his role, while working as a consultant in the private sector, in dissuading affected community members from supporting NPL listing. Glenn previously served as Director of the Alabama Department of Environmental Management. Former Alabama Environmental Management Commissioner Scott Phillips has also been indicted for his alleged role as a public official in this conspiracy. These developments, while disturbing, are sadly unsurprising given the degree of corruption that has marred this process from the beginning.

As you know and as stated in my previous letter, on September 22, 2014, EPA made a preliminary recommendation to include the 35<sup>th</sup> Avenue Site on the NPL, following years of study and analysis. At that time, soil sampling in the impacted area had scored a 50 on the Hazard Ranking System ("**HRS**"), which was well above the 28.5 minimum HRS score traditionally used by EPA to determine eligibility for placement on the NPL. Deputy Regional Administrator Walker notes in her response letter that, from September 22, 2014, to January 22, 2015, EPA held a public comment period on the proposed NPL addition, during which "the EPA received numerous public comments both in support of and in opposition to adding the site to the NPL."

It is worth noting, however, that many of the public comments received in opposition to NPL listing were influenced by what we now know was a coordinated and criminal misinformation campaign that led to the convictions of a local business executive, an attorney, and a state legislator on a number of charges, including conspiracy, wire fraud, and bribery. As a result, many community members do not trust the testing that has been done and the decisions that have been made so far, because for years the process was plagued with corruption and dishonesty. Many of those living in the neighborhoods affected by the 35<sup>th</sup> Avenue Site also feel their concerns are not

being heard. The individuals living in these communities deserve a voice in this process. EPA must not only listen to these communities, but meaningfully consider their views. Soliciting community feedback should be a tool used in the decision-making process, not an empty procedural gesture.

While I appreciate that considerable removal work has been conducted by EPA over the last five years, details of which are set out in the Deputy Regional Administrator's response letter, I remain deeply concerned about a number of issues.

**Given these concerns, I provide the following context and ask that you provide responses to the following questions:**

The Deputy Regional Administrator writes in her response letter that no final decision on NPL listing for the 35<sup>th</sup> Avenue Site has been made. In what appears to be partial justification for this delay, the Deputy Regional Administrator states that "the extent of soil cleanup under the EPA's removal authority is equivalent to that which would be achieved under the EPA's remedial authority had the site been listed on the NPL." The response letter also details the removal actions taken by EPA so far at the 35<sup>th</sup> Avenue Site, pointing out that more than 390 properties have been cleaned up, at a cost of approximately \$21 million, and that approximately 137 occupied residential properties with contamination above Removal Management Levels ("RMLs") remain to be cleaned up, at an estimated cost of \$7 million.

While I understand that the environmental and technical circumstances surrounding a potential listing are complex, and that EPA has undertaken considerable removal efforts, this does not excuse further delay in making a final decision on NPL listing. As part of its own mission statement, EPA says it works to ensure that all Americans "have access to accurate information sufficient to effectively participate in managing human health and environmental risks."<sup>1</sup> The impact of the ongoing uncertainty around the 35<sup>th</sup> Avenue Site on residents of the affected communities cannot be understated. While I appreciate that some information about removal actions to date is available on EPA's website,<sup>2</sup> this information does not tell residents whether or not they are safe living in their own homes, and does not provide enough information on cleanup efforts for residents to effectively plan their own lives, including whether or not they choose to relocate from the affected neighborhoods. It has now been more than one year since I received Deputy Regional Administrator Walker's response letter. The North Birmingham, Fairmont, Harriman Park, and Collegeville communities have, as a result, gone one more year without the certainty such a decision would provide. It has also now been more than five years since EPA made its initial proposal to list the 35<sup>th</sup> Avenue Site on the NPL.

**1. Why has EPA not made a final decision on NPL listing for the 35<sup>th</sup> Avenue Site, and when does it expect that a final decision will be made?**

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<sup>1</sup> U.S. Environmental Protection Agency, *Our Mission and What We Do*. (<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>)

<sup>2</sup> U.S. Environmental Protection Agency, *Superfund Site: 35<sup>th</sup> Avenue Birmingham, AL, Cleanup Activities*. (<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0410750#Status>)

2. **How many times has EPA adjusted its spending cap for the 35<sup>th</sup> Avenue Site, and when does the agency anticipate that this spending cap will be reached?**
3. **Deputy Regional Administrator Walker's response letter states that "properties where soil contamination exceeds the EPA's residential Removal Management Levels (RMLs) for arsenic, lead and benzo (a) pyrene" have been prioritized for cleanup. How did EPA determine to sample for and set RMLs for these particular contaminants?**
4. **The Deputy Regional Administrator writes in her response letter that, in the case of the 35<sup>th</sup> Avenue Site, "the extent of soil cleanup under the EPA's removal authority is equivalent to that which would be achieved under the EPA's remedial authority had the site been listed on the NPL." What evidence can EPA provide that, in the case of the 35<sup>th</sup> Avenue Site, the extent of removal actions is equivalent to what would have taken place had remedial actions been taken?**
5. **Does EPA anticipate that its ongoing removal actions at the 35<sup>th</sup> Avenue Site will be adequate to complete cleanup, or does it anticipate that remedial action will be necessary?**
6. **How has EPA's Superfund Redevelopment Initiative informed cleanup efforts on the ground, and how has the Superfund Redevelopment Initiative contributed to efforts to redevelop and revitalize the 35<sup>th</sup> Avenue Site?**

The Deputy Regional Administrator's response letter points to EPA's "highly visible presence in the community" as evidence that EPA "is working hard in North Birmingham to protect public health." The letter points to, among other things, the agency's community phone hotline and the meetings EPA organizes and/or participates in to share cleanup information with the community and other stakeholders. The letter also refers to EPA having helped to establish the North Birmingham Community Coalition, which the Deputy Regional Administrator says is "meeting regularly to discuss approaches to build capacity and to improve the community's understanding of the work taking place there." On its website, EPA also says it is updating its Community Involvement Plan for the 35<sup>th</sup> Avenue Site, which it expected to release in the summer of 2019.

7. **For how long did EPA host a community phone hotline in relation to the 35<sup>th</sup> Avenue Site? Can you please provide data on the number of calls fielded by the community phone hotline?**
8. **Can you please provide a list of the meetings EPA has organized in relation to ongoing cleanup efforts since 2014, including when and where these meetings took place?**
9. **Can you please provide a list of meetings held by the North Birmingham Community Coalition in the last two years?**



- 10. EPA says on its website that it expects to release its Community Involvement Plan for the 35<sup>th</sup> Avenue Site in the summer of 2019. It is now November 2019. When does EPA plan to publish its updated Community Involvement Plan for the 35<sup>th</sup> Avenue Site?**

Over a period of several years, a number of individuals – some of whom have now been convicted and others of whom have been recently indicted – orchestrated a misinformation campaign in order to manipulate and mislead affected community members. This has led to a high level of public distrust that persists to this day, with many community members seeing the process as having been fundamentally undermined. There is considerable concern among affected community members that, because of a process infiltrated by corruption from its inception, they cannot trust EPA to protect their long-term health and well-being.

- 11. While EPA says a final decision as to NPL listing for the 35<sup>th</sup> Avenue Site has not been made, it has not yet followed through on its preliminary recommendation of September 22, 2014, to list the 35<sup>th</sup> Avenue Site on the NPL. To what extent was EPA's inaction on this preliminary recommendation influenced by public opposition to the listing during the public comment process held from September 22, 2014, to January 22, 2015?**

- 12. What steps is EPA taking to build trust with the affected communities, in the wake of the criminal conspiracy to undermine the NPL listing process?**

In her response letter, Deputy Regional Administrator Walker refers to “the discovery of contamination in the Fairmont, Collegeville and Harriman Park neighborhoods in 2013 and 2014.” EPA previously considered conducting testing to determine whether the boundaries of the 35<sup>th</sup> Avenue Site should be extended to the neighborhoods of Inglenook and Tarrant. There is understandable frustration among some residents of these communities, which are not presently included within the boundaries of the 35<sup>th</sup> Avenue Site.

- 13. How did EPA decide on the final geographic scope of the 35<sup>th</sup> Avenue Site?**

- 14. Did EPA conduct the testing necessary to determine whether Inglenook and Tarrant should be included in the 35<sup>th</sup> Avenue Site? If not, why was this testing not conducted? If so, what were the results of this testing?**

- 15. While Deputy Regional Administrator Walker refers to contamination having been discovered in the Fairmont, Collegeville, and Harriman Park neighborhoods in 2013 and 2014, information on EPA's own website<sup>3</sup> suggests that discovery of contamination in these neighborhoods happened as early as 2011. When was**

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<sup>3</sup> U.S. Environmental Protection Agency, *Cleanup Process in the North Birmingham Environmental Collaboration Project*. (<https://www.epa.gov/north-birmingham-project/cleanup-process-north-birmingham-environmental-collaboration-project>)

**contamination discovered in the Fairmont, Collegeville, and Harriman Park neighborhoods?**

According to HRS documentation prepared by EPA in September 2014, “Air is the primary source of deposition within the 35<sup>th</sup> Avenue site [area of observed contamination], from smokestacks and windblown particles from process fines and other stockpiled material.” The document goes on to explain that “aerial deposition of lead, arsenic, and BaP throughout the 35<sup>th</sup> Avenue site is supported by the variability in wind direction.”<sup>4</sup>

**16. What is EPA’s view on the issue of air deposition in neighborhoods affected by the 35<sup>th</sup> Avenue Site? Has EPA’s position changed from that expressed in the September 2014 HRS documentation, which concluded that “Air is the primary source of deposition within the 35<sup>th</sup> Avenue site [area of observed contamination]”?**

For far too long, residents of the North Birmingham, Fairmont, Harriman Park, Collegeville, and surrounding communities have lived with uncertainty regarding not only whether or not the 35<sup>th</sup> Avenue Site would be listed on the NPL, but also whether they could trust EPA, given that its decision-making process may have been influenced by a criminal conspiracy.

All Alabama residents deserve to live in clean and safe conditions, free from soil, water, and air contamination. EPA has already taken steps, in the form of removal actions, to improve the lives of the individuals affected by the 35<sup>th</sup> Avenue Site. I ask that you build on this progress by giving residents of the affected communities the certainty they deserve.

You can do this by providing information on why the NPL listing has not happened, whether the community can ever expect remedial action, and how EPA is conducting meaningful and ongoing outreach to community members. You can also do this by answering questions which are a source of continued confusion and frustration for residents, including clarifying EPA’s views on air deposition and explaining how the geographic scope of the 35<sup>th</sup> Avenue Site was determined. Finally, the affected communities deserve to know to what extent EPA’s inaction in listing the 35<sup>th</sup> Avenue Site on the NPL was influenced by a known criminal conspiracy, and how EPA is working to address earned distrust in the affected communities.

I stand ready to offer whatever assistance I can in this process. Thank you for your prompt attention to this request.

Sincerely,



Doug Jones  
United States Senator

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<sup>4</sup> U.S. Environmental Protection Agency, *Proposed HRS Documentation Record*, (September 2014): p. 16 (<https://semspub.epa.gov/work/04/11121059.pdf>)

CC: Randall L. Woodfin, Mayor, City of Birmingham  
Congresswoman Terri A. Sewell (AL-07)  
Mary Walker, EPA Region 4 Administrator





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The Honorable Doug Jones  
United States Senate  
Washington, D.C. 20510

Dear Senator Jones:

Thank you for your November 13, 2019 letter to the U.S. Environmental Protection Agency Administrator Andrew Wheeler concerning the cleanup of the 35th Avenue site (Site) in North Birmingham. Your letter was forwarded to my office for response, and we appreciate your continued interest in this matter.

The cleanup of the Site remains a priority for the EPA. Our goals are to protect the health of North Birmingham residents, and to clean up and restore the affected neighborhoods as expeditiously as possible.

Initial residential sampling in North Birmingham was performed by the former Walter Coke facility in 2009 under the EPA's Resource Conservation and Recovery Act program. The Site was referred to the EPA's Superfund program in 2011, and the EPA began its own investigation in late 2012 (initial sampling report finalized in December 2013). Air modeling of the facility's operations was used to determine the initial Site boundaries, however, the EPA expanded them to include all of the Collegeville and Harriman Park neighborhoods and most of Fairmont (the most populated areas closest to the facility). In 2016, in response to a petition, the EPA conducted a Preliminary Assessment and Site Inspection of the nearby south Tarrant and Inglenook neighborhoods. The EPA found the soils at the properties tested do not present an unacceptable risk to human health and require no EPA action.

Though air deposition likely contributed to the elevated levels of contaminants, subsequent modeling, sampling, field observations and historical information have shown the primary source is contaminated fill material from local facilities that was used in low-lying areas to prevent flooding. As part of the North Birmingham removal site evaluation that began in November 2012, the EPA sampled properties for likely contaminants from surrounding industrial operations, including polycyclic aromatic hydrocarbons (PAHs), arsenic, semi-volatile organic compounds, eight metals, polychlorinated biphenyl aroclors and hexavalent chromium. Based on the sample results, arsenic, lead, and benzo (a) pyrene (used to represent carcinogenic PAHs) were determined to be the contaminants of concern. Properties where concentrations of these contaminants were found to be above the respective chemical-specific Removal Management Level (RML) are being cleaned up. RMLs are posted on EPA's website at: <https://www.epa.gov/risk/regional-removal-management-levels-chemicals-rmls>.

The EPA is using its removal authorities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as Superfund) to clean up contaminated soil at the Site. To date, the soil at about 1,950 residential properties in North Birmingham have been tested. Of those, the EPA identified 658 properties requiring cleanup and 473 have been cleaned up. Cleanup costs to date total more than \$27.6 million, and the initial project ceiling of \$3,180,000 in 2013 has increased



four times to its current value of \$43,877,000 (these values do not include EPA oversight costs). The remaining cleanup work at the Site is expected to be completed under the current project ceiling within three years assuming access to the properties to conduct the work is obtained.

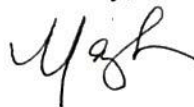
Since the EPA responded to your last letter in October 2018, 19 additional occupied residential properties have been tested and 88 have been cleaned up. At this time, there are 18 properties slated for cleanup for which homeowners have given permission to the EPA to conduct the work, and 39 occupied properties remain to be tested. Additionally, the EPA received judicially approved access to sample 501 vacant properties and, of those, 149 were found to exceed RML(s). The EPA has requested judicially approved access to clean up the contaminated vacant properties.

The cleanup approach – soil excavation and replacement with clean soil – is the same approach that would be used for residential properties if the Site were added to the Superfund National Priorities List (NPL). At this juncture, adding the Site to the NPL would not change the scope or approach to clean up the contaminated residential soil, nor would it speed up the pace of work. Given that most of the affected properties have already been excavated and restored, the EPA believes that continued use of its removal authorities is most appropriate. We anticipate the removal activities will address all residential properties that exceed the RMLs and no further response action will be necessary.

The EPA has worked hard to establish strong relationships and build trust within the North Birmingham communities that have been impacted. Since cleanup work began in February 2014, the EPA and its contractors interact constantly with residents so we can sample, excavate and then restore/landscape their property. Prior to every sampling event and excavation, the EPA meets with residents to explain the sampling and cleanup process and set the schedule. The EPA has also hosted a community phone hotline since October 2012 that is answered by a community outreach contractor, however, calls are not logged. EPA staff regularly meet with residents and community leaders, including representatives of the City of Birmingham, the Housing Authority of the Birmingham District and the Birmingham City Schools, to provide updates and answer questions. Since 2014, EPA has hosted dozens of meetings (public meetings, open houses, site tours) and participated in others (meetings with homeowner associations, the North Birmingham Community Coalition, other nonprofit and community groups, and summer camps). The updated Community Involvement Plan for the 35th Avenue Site was completed in fall 2019 and is published on the website: [www.epa.gov/superfund/35th-avenue](http://www.epa.gov/superfund/35th-avenue).

We are committed to a robust and transparent process as we address the remaining properties. To ensure that the EPA fully answers all of your questions about the Site, I have asked my staff to set up a meeting with you. Brandi Jenkins, in the Region 4 Office of Outreach and External Engagement, will be contacting your office to set up this call or meeting.

Sincerely,



Mary S. Walker  
Regional Administrator

cc: Randall L. Woodfin, Mayor, City of Birmingham  
Terri Sewell, Congresswoman, Alabama 7<sup>th</sup> District